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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 710.

WILLIAM RUCKER, WILLIAM BUTLER,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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WILLIAM RUCKER, WILLIAM BUTLER,

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STATE OF OHIO,

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Counsel for the petitioners, William Rucker and William Butler, on their behalf, prays that a writ of certiorari issue to review the decision of the Ohio Supreme Court affirming a judgment of the Court of Appeals for Cuyahoga County, Ohio, and the judgment and sentence of the Court of Common Pleas of Cuyahoga County, Ohio rendered on or about the thirteenth day of November, 1956 and affirmed in the Supreme Court of Ohio on or about the ninth day of October, 1957.

OPINIONS BELOW.

None of the Court below wrote opinions or memorandums, reported or unreported.

JURISDICTION.

The jurisdiction of this Court is invoked on the basis that the state court, The Supreme Court of Ohio, has decided questions of federal importance involving the constitutional rights of the Appellants, some of which have not

heretofore been decided and determined by this Court, and some of which were in opposition to the determinations of this Court in applicable decisions. That substantial rights of the petitioners have been violated as a result. The judgment of the Supreme Court of Ohio was rendered on or about October 9, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (2) and (3).

QUESTIONS PRESENTED.

The questions presented here are many and are here set forth in as short and accurate a manner as possible.

1. Were the appellants' rights under Amendment Five of the United States Constitution violated as respects:

(a) their rights not to be tried twice for the same offense, when they were charged under two statutes for the same act, and where the two statutes are a greater and lesser degree of the same crime, and where one is an included offense within the other.

(b) their rights under the due process provision, when the trial court permitted testimony to be considered by the jury which concerned a third person only, jointly indicted, but discharged by the court at the close of the State's evidence, and which had no connection whatsoever to the appellents.

2. Were the appellants' rights under Amendment Six of the United States Constitution violated, as respects their right to be confronted by their accuser, and to have the right to cross examine said accuser, when testimony of a witness not present was permitted by the trial judge through third persons who related the testimony of the missing witness?

3. Were the rights of the appellants under the Fourth Amendment of the United States Constitution violated when Federal Agents of the Treasury Department seized and searched the automobile of the Appellant Rucker without a warrant, although they had sufficient time to obtain one had they desired?

STATUTES INVOLVED.

The Statutes of the Ohio Revised Code which are involved in this appeal are as follows:

> Section 3719.09 "No person * * * shall have in his possession or under his control any narcotic drug unless such drug is exempted under the provisions of Section 3719.15 of the Revised Code * * *"
>
> Section 3719.20(A) "No person shall (A) Possess for sale a narcotic drug except in accordance with the provisions of Sections 3719.01 to 3719.22, of the Revised Code * * *"

(Only the pertinent portions of the Statutes, under which the indictments are based are here quoted and set forth.)

STATEMENT.

The appellants were arrested in Cleveland, Ohio, on or about August 17, 1956, and charged with violations of the Narcotics Law of Ohio. They were arraigned in the Cleveland Municipal Court and subsequently indicted by the Grand Jury of Cuyahoga County on September 25, 1956, and entered a plea of not guilty to the counts of the indictment charging three separate offenses growing out of the same act alleged. These counts were for violation of the following sections of the Revised Code: 3719.09, 3719.101, 3719.20(A).

Trial was held before the Honorable Felix Matia on or about November 13, 1956, with the jury returning a verdict of guilty on all counts against the Appellant Rucker and a verdict of guilty to the counts charging violation of 3719.09 and 3719.101 against the Appellant Butler, and a verdict of not guilty against Appellant Butler on the charge of violation of 3719.20(A). Both appellants were sentenced on all counts concurrently. On the 3rd day of May, 1957, the Court of Appeals for Cuyahoga County, Ohio, sustained the judgment of the Common Pleas Court.

The facts involved herein are rather lengthy and involved, but briefly, the witness who was not called testified that after Appellant Rucker had visited a gasoline station at East 70th Street and St. Clair Avenue, in the City of Cleveland, he found in the washroom, both men's and women's, a package of what was later testified was narcotics. Appellant Butler was later in the station and left. Rucker and Butler both returned later in each other's company, and the Federal agents arrested them in Rucker's car with, allegedly, one packet of heroin on the floor of the car, which is identified as the same packet in the men's room earlier.

ARGUMENT.

Throughout the trial, counsel constantly objected to admission of hearsay evidence and took his exceptions, and objected before and after the court's charge to the jury, and asked the court to charge that they must not consider this evidence, and also that they must not consider evidence introduced only as concerns the third person who was no longer in this case as a result of having been discharged upon defense motion at the close of the State's case in chief.

Objections were also raised throughout the trial and before and after the court's charge and by many motions which were overruled concerning the other questions here raised.

These objections, motions and exceptions make up a considerable portion of the rather lengthy trial record which is herewith filed in its original form (one copy only) directly from the Supreme Court of Ohio. Counsel hesitates to burden the court with many pages of quotations from the record inasmuch as the questions here raised are also raised in the Supreme Court of Ohio, based upon the same objections and exceptions here complained of. These objections are set forth in the Supreme Court as "Assignments of Error" on page one of the Defendants-Appellants' brief in that Court.

All objections were overruled and all affirmations by Supreme Court of Ohio and Court of Appeals for Cuyahoga County were done without opinion or memorandum. Appended hereto in the Appendix are quotations from the trial transcript which give some examples to the court that objections and exceptions to the violations here complained of were properly and timely made, without burdening the court with page after page of this type of quote.

Copies of all judgments, and orders are filed herewith as originals with documents forwarded from the Supreme Court of Ohio.

Briefly appellants complain here of the conduct of the trial court in permitting State's witness to testify as to things seen and done by a man named Schultz who was never brought to the trial to testify to these things himself. Without his "evidence" the appellant could not have been found guilty. To overcome his unavailability, or his not being present for whatever reason, the State elicited from three other persons what this man would have testified to had he been present himself, although these facts were not within the knowledge of the witnesses tstifying.

Further, the court permitted evidence of the complicity and guilt of a third person charged in the joint indictment during the State's case in chief. At the conclusion of the State's case, the trial judge discharged the third defendant. At this point and thereafter, Counsel requested that this evidence which could by no stretch of the imagination be applied to the appellants be stricken and the jury instructed how they were to consider, if at all, this evidence. The court did refuse, and the evidence went to the jury for their consideration, with instruction.

Counsel further moved that the prosecution be required to elect which of the crimes they wished to proceed upon, as charged in the indictment since two of the three offenses charged were greater and lesser degrees of the same offense. The court did refuse, and appellant Rucker was convicted of both degrees, and sentenced upon both.

Federal Narcotics Squad Agents were the arresting officers, and elected to turn the appellants over to the City Police to have them charged under State Statutes. These agents were apprised of the commission of a crime some

three hours before arrest. They made the arrest while the courts were in session, and yet knowing that they would probably have to make a search and arrests failed to obtain warrants prior to the search of appellant Rucker's car, and for arrest of appellants, although they could easily have done so.

REASONS FOR GRANTING THE WRIT.

"The life of a man shall not be twice put in jeopardy for one and the same offense." (*Vaux's Case*, 4 Co. Rep. 44a.) This is the basis for our Constitutional prohibition. This Court has zealously guarded this principle through the years. In the instant case, the Appellants have been charged twice with commission of the same offense so as to have placed them twice in jeopardy. All acts alleged to have been committed by appellants took place at the same instant, and involved possession of a single packet of narcotic drugs. For this possession they were charged with two separate crimes, one of which is a lesser included offense of the other. (See Statutes involved.)

The law in Ohio as well as in this Court is clearly that if the defendant upon the first charge could have been convicted of the offense in the second then he has been in jeopardy. (*State vs. Billotto*, 104 Ohio State 13.) (*State vs. Crowley*, 94 Ohio St. 88.) (*Miller vs. United States*, 300 Fed. 529.) A judgment on an indictment alleging in general terms every fact necessary to constitute an offense is a bar to subsequent prosecutions for any offense which could have been proved under that indictment. In the *Miller* case above, the court said,

> "where an act of possession was merely that necessarily incidental to a sale a sentence for sale of intoxicating liquors and possession thereof constituted a double punishment for the same act."

This is precisely the state of the evidence in the instant case. Appellants were charged with both possession, and the same possession for the purpose of sale. The same evidence was required to sustain both crimes, and appellants were charged with and tried on both crimes, one of the appellants being convicted on both charges.

In *Reynolds vs. United States*, 280 Federal 1, the court said that:

> "Defendant could not be punished under each of two counts, one charging the manufacture and possession of intoxicating liquors and the other possession of the implements and materials designed for manufacture of such liquor * * * although she (the Defendant) did not require the government to elect."

Upon trial Defendants were required by court ruling to defend themselves upon evidence introduced concerning a third party not a defendant at the conclusion of the case. Great quantities of narcotics were found in the Ladies' washroom of a gasoline station, and introduced into evidence for the sole purpose of implicating a woman subsequently discharged by the trial court upon motion at the conclusion of the State's case in chief. The appellants are both men, and there was no evidence or claim by the prosecution that they placed same there. Yet the jury without any instruction whatsoever was permitted to consider that evidence in deciding this cause.

An individual named Schultz, who never appeared for examination, saw certain things and did certain things prior to the arrest of the appellants. What he did and saw was testified to by other persons, without the opportunity being afforded to appellants of examining this individual who was in effect their accuser, in that what he saw and did constituted the State's case.

Appellants were in this case required to hurdle great obstacles placed in their paths, beyond normal. As a result, the rights afforded those charged with crime under the Constitution of this Country were abused and violated, and this Court should review the judgment of the Ohio Courts.

CONCLUSION.

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

MONROE G. MARKS,

Attorney for Petitioners.

APPENDIX.

QUOTATIONS FROM TRIAL RECORD.

The following are quotations from the trial record.

Page 330:

"Mr. Marks: I am at this time requesting the court to charge the jury as concerns the defendant Macy Bullock, and to instruct the jury not to consider any testimony as regards her in determining the guilt or innocence of the other two defendants.

The Court: Overruled.

Mr. Marks: Note my exceptions."

Page 311:

"Mr. Marks: If the court please, at this time I move that the court withdraw from the consideration of the jury State's Exhibit 1. (The narcotics found in the ladies washroom.)

The Court: (on page 313) Both motions are overruled."

Page 330:

"Mr. Marks: I want to ask the court to instruct the jury that the first count of the indictment is an included offense in the second count and that they cannot be found guilty of both.

The Court: Overruled."

JOURNAL ENTRY OF THE COURT OF APPEALS OF CUYAHOGA COUNTY.

Dated: May 3, 1957.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellants and therefore the judgment of the Court of Common Pleas is affirmed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellants except.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(No. 35235—Decided October 9, 1957.)

APPEAL from the Court of Appeals for Cuyahoga County.

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, STEWART, BELL, TAFT and HERBERT, JJ., concur.

MATTHIAS, J., not participating.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 710.

WILLIAM BUTLER, WILLIAM RUCKER,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF FOR THE STATE OF OHIO

In Opposition to the Granting of the Petition for a Writ of Certiorari to the Supreme Court of Ohio.

JOHN T. CORRIGAN,
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Attorney for Respondent, State of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 710.

WILLIAM BUTLER, WILLIAM RUCKER,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF FOR THE STATE OF OHIO

In Opposition to the Granting of the Petition for a Writ of Certiorari to the Supreme Court of Ohio.

Neither the Court of Appeals of the Eighth District nor the Supreme Court of Ohio wrote an opinion. The order of the Supreme Court of Ohio denying the appeal and overruling the Motion for a Writ of Certiorari is reported at 167 O. S. 17. The judgment of the Supreme Court of Ohio was entered on October 9, 1957. The Petition for Writ of Certiorari was filed on the 7th day of January, 1958. The jurisdiction of this Court is invoked by the Petitioners under 28 U. S. C. 1257 (2) and (3).

QUESTIONS PRESENTED.

1. Whether rights of Petitioners under the Fifth Amendment to the United States Constitution were violated

(a) Because they were charged with two offenses under different sections of the Ohio Revised Code, for substantially the same act.

(b) Because the trial court failed to instruct the jury to disregard testimony concerning actions of a

third person who was jointly indicted with Petitioners but was discharged by the Court at the close of the State's case.

2. Whether Petitioners' rights under the Sixth Amendment to the United States Constitution were violated when the court permitted testimony concerning the actions of a third person present at the scene of the alleged offense.

3. Whether the rights of Petitioners under the Fourth Amendment to the Constitution of the United States were violated when agents of the United States Treasury Department seized and searched the automobile of Petitioner Rucker at the scene of the alleged offense.

STATUTES INVOLVED.

The Sections of the Ohio Revised Code which are involved in this appeal are as follows:

> Section 3719.09 "No person * * * shall have in his possession or under his control any narcotic drug unless such drug is exempted under the provisions of Section 3719.15 of the Revised Code * * *"
>
> Section 3719.20(A) "No person shall (A) Possess for sale a narcotic drug except in accordance with the provisions of Sections 3719.01 to 3719.22, of the Revised Code * * *"

(Only the pertinent portions of the Statutes, under which the indictments are based are here quoted and set forth.)

STATEMENT.

The Petitioners were arrested in Cleveland, Ohio on August 17, 1956 and charged with violations of the Ohio Narcotics Law. They were subsequently indicted (1) for unlawfully having heroin in their possession and under their control contrary to the provisions of Ohio Revised

Code, Section 3719.09, (2) for unlawfully possessing heroin for sale contrary to the provisions of Ohio Revised Code, Section 3719.20 and (3) for unlawfully permitting the use of a vehicle for the illegal keeping of heroin contrary to the provisions of Ohio Revised Code, Section 3719.101.

The Petitioners Rucker and Butler were indicted jointly with one Macy R. Bullock who was discharged at the conclusion of the state's case. Trial was held before the Honorable Felix Matia in November 1956 and the jury returned a verdict of guilty on all three counts against the Petitioner Rucker and a verdict of guilty to the counts charging violation of Ohio Revised Code, Sections 3719.09 and 3719.101 against the Petitioner Butler. Both Petitioners were sentenced on all counts concurrently. On May 3, 1957 the Court of Appeals of Cuyahoga County, Ohio sustained the judgment of the Common Pleas Court. On October 9, 1957 the Supreme Court of Ohio overruled the Motion of these Petitioners for a Writ of Certiorari and denied their appeal.

The evidence adduced at the trial of this matter was briefly, as follows: After Petitioner Rucker and his female companion Macy R. Bullock visited a certain gasoline station and used the respective rest rooms there were found in the rest rooms, both the men's and the women's, practically identical packages containing what later proved to be heroin, a derivative of opium. Shortly after the envelopes of heroin were found and removed from the rest rooms, Petitioner Butler visited the station and the men's rest room and left immediately. The envelopes of heroin were then returned by the Federal agents who had been called to their respective places in the rest rooms. Petitioners Rucker and Butler returned together in Rucker's automobile a short time later and Petitioner Rucker went

into the men's rest room and came out carrying one of the packages of heroin and handed it to Petitioner Butler in the automobile. These two Petitioners were then apprehended by the Federal agents at which time the package of heroin was found on the floor of the automobile under Petitioner Butler's feet. Testimony as to the foregoing facts was adduced through the two gasoline station proprietors and the Federal narcotics agents as witnesses. All testimony concerning Defendant Macy Bullock was as to her actions in the presence of Petitioner Rucker.

ARGUMENT.

The facts disclose that these two petitioners were apprehended in possession of the narcotics and that they were arrested immediately after Rucker passed the package of narcotics to Butler. There was eye-witness testimony to this effect. What is circumstantial about such evidence? What inferences need be drawn except those from proven facts?

No testimony as to what Kenneth Schultz said was introduced or admitted over objection of defendants' counsel. Certainly, there was testimony concerning the actions of Kenneth Schultz in finding the narcotics in the ladies' rest room and his bringing the package into the service station office. The State's case against these defendants might have been even stronger if Kenneth Schultz could have been found to testify at the time of trial, but his testimony would have been only cumulative, as there were others who could and did testify as to the events leading to the arrest of the defendants.

In response to petitioners' argument concerning the admission of evidence on the activities of Macy Bullock, the third defendant jointly indicted, it is submitted that the said Macy Bullock was on trial with these defendants at

the time of the admission of such testimony and the testimony was properly admitted at that time and it was already before the jury when Macy Bullock was discharged at the conclusion of the state's case. The court's failure to instruct the jury to disregard such testimony could hardly be construed to be prejudicial, since all of the testimony concerning Macy Bullock was as to her actions in the presence of Petitioner Rucker.

As to the Petitioners' complaint concerning "search" of Petitioner Rucker's automobile, a study of the testimony will readily show that no "search," as such, was necessary. Upon opening the door of the car on the passenger side to apprehend Butler, who was sitting in the car and to whom Rucker had just passed the envelope of narcotics in question, the federal narcotics agents simply had to look at the floor of the car where Butler's feet rested to see the envelope. Such a procedure can hardly be referred to as a "search."

On the question of "double jeopardy," a perusal of Chapter 3719 of the Ohio Revised Code reveals an intent on the part of the legislature to segregate the prohibitions on "possession" of narcotics and on use of motor vehicles and buildings for dispensing, from the sections containing other prohibitions and regulations. It would appear that the legislature intended to prohibit possession of narcotics as a matter of public policy, and then, in Section 3719.20, made specific prohibitions with reference to the protection of individual persons from being exposed to narcotics by peddlers.

Viewing Chapter 3719 of the Ohio Revised Code as a whole one can hardly escape the conclusion that the legislature was describing two different classes of crimes when it purposely differentiated between "possession" and "possession for sale." Had that not been the intent, it would

surely have included mere possession as one of the subdivisions in Section 3719.20 and would have omitted Section 3719.09.

The pertinent portion of Ohio Revised Code, Section 3719.09, is as follows:

> "No person except * * * shall have in his possession or under his control any narcotic drug unless such drug is exempted * * * Possession by a person not excepted * * * is presumptive evidence of intent to violate the provisions of this section."

In Section 3719.99, wherein the penalties are set forth, a penalty for violation of Section 3719.09 is provided in paragraph C, to be a fine of not more than ten thousand dollars and imprisonment not less than two or more than fifteen years for the first offense.

The pertinent portion of Section 3719.20 is paragraph (a), which reads as follows:

> "No person shall:
>
> (A) Possess for sale a narcotic drug except in accordance with the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code."

The penalty provided for violation of this latter section is also contained in Section 3719.99, but in a different paragraph than the penalty provided for violation of Section 3719.09 and is imprisonment for a period of not less than ten nor more than twenty years for the first offense.

Again, by these separate provisions and penalties, the legislature indicated its intent to treat the two offenses in a different manner.

It is the contention of the State of Ohio that we are dealing with two different classes of crimes which are essentially different in their nature and which are considered crimes for different reasons.

In the case of *State vs. Labus,* 102 O. S. 26, 130 N. E. 161, the Court stated in its opinion, the following:

> "The doctrine of inferior degrees has never been applied by our courts to crimes which are inherently and essentially so different in their nature, character and atrocity as to belong to an entirely different class of crimes."

In that case, the Court held that the crime of incest was not included within the crime of rape as being one of an inferior degree to rape and based its reasoning upon the theory that rape was considered an offense against a person, whereas, incest could well be considered a crime against public policy.

Again, in the case of *Watha vs. State,* 14 O. C. C. n.s. 145, the Court held that one crime could not be considered as of an inferior degree or included in another where they belonged to different and individual classes of crime. There the Court held that one indicted as member of a lynch mob could not be found guilty of inciting to riot, inasmuch as inciting to riot was not an included offense.

This Court's attention is directed to *Barber v. State,* 39 O. S. 660, where the defendant was indicted for maliciously cutting with *intent to kill.* That indictment was then based on Section 6820, Revised Statutes, which provided that "whoever maliciously shoots, stabs, cuts or shoots at, another person, with intent to kill, wound or maim such person, etc." The verdict was guilty of "maliciously cutting with *intent to wound.*" The court pointed out that the same statute made "cutting with intent to kill" and "cutting with intent to wound" *two separate offenses.* The court further pointed out that "he (defendant) could not, upon this indictment, be properly found guilty of 'maliciously cutting with intent to wound. That is not an 'in-

ferior degree' to that charged in the indictment,' within the meaning of that statute, *but is of the same degree.*"

One of the tests laid down by the courts is that where several crimes are included, one within the other, a conviction or acquittal of the higher bars a prosecution for any lower, since the greater includes the less. In the case now before us, *if* the defendant had been indicted and acquitted of *possession for sale*, he certainly could have been reindicted and convicted of *possession*. Both crimes are of equal degree, and one is not an included offense within the other. In one offense the wrongful act is the mere *possession*; in the other offense the wrongful act is the *possession for sale*.

It will be noted that Ohio Revised Code 3719.20 sets forth some eleven different prohibitions concerning narcotic drugs. Each of these eleven is different and separate from the others but each is of the same degree as the others. *Possessing for sale* is set up as an entirely distinct offense; *sale* is a distinct and separate offense. Each is independent of the other; both may be present in the same act; and convictions may be had on both notwithstanding there was but one act.

Possession for sale of a *contraband* such as narcotics is a complete offense, separate from the sale of that contraband. Possession of counterfeit money, a machine gun, etc., is in and of itself a distinct and separate offense from the sale of that contraband.

15 *American Jurisprudence* 63, on the question of double jeopardy, says, "A single act may constitute two or more distinct and separate offenses, and a person charged therewith may be convicted and punished for both." (*Roarke v. United States* (C. C. A. 8th), 17 F. (2d) 570; 51 A. L. R. 870.) "Prosecution of a person for separate offenses based upon the same transaction does not

involve double jeopardy where there are distinct elements in one offense which are not included in the other. These rules have been applied many times in particular prosecutions. For instance, they have been applied in prosecutions for abortion, adultery, forgery, unlawful operation of an automobile, incest, prostitution, larceny, burglary, violations of the liquor laws, etc."

Again, at 15 *American Jurisprudence* 67, is the following statement:

> "A single act may be an offense against two statutes, and if one statute necessitates proof of a different circumstance or element from that which the other requires, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other * * *. Undoubtedly, it is within the power of the legislature to create two or more offenses which may be committed by a single act, each of which is punishable by itself. A conviction or acquittal in such case under either statute would be no bar to a conviction under the other, for the accused would not be twice in jeopardy for each offense."

CONCLUSION.

It is respectfully submitted that an examination of the record in this case strongly establishes the guilt of these defendants and that their rights were in no way prejudiced by any factor of which complaint is made. For these reasons it is urged that the jury's verdict of conviction should be upheld and the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN T. CORRIGAN,

Prosecuting Attorney of Cuyahoga County,

Attorney for State of Ohio.